

77-4044

To be argued by
ROBERT M. ZISKIN

In The

United States Court of Appeals

For The Second Circuit

LOCAL 810, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

77-4069

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

EMCO STEEL, INC.,

Respondent.

*On Petition For Review and Cross-Petition For Enforcement of
an Order of the National Labor Relations Board.*

**BRIEF FOR PETITIONER LOCAL 810,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA**

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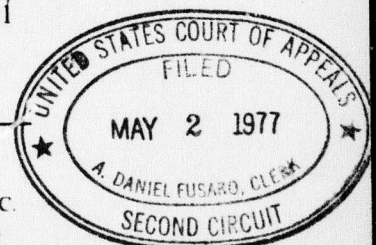
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BRIEF FOR LOCAL 810, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA

PRELIMINARY STATEMENT

This case is before the Court upon the
petition of Local 810, International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of America,
herein "Local 810", pursuant to Section 10(f) of the

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 518, 29 U.S.C. Sec. 151 et seq.), herein "the Act", for review of a Decision and Order (*App.* 467a)^{1/} of the National Labor Relations Board, herein "the Board", issued on January 13, 1977. The Board's Decision and Order are reported at 227 NLRB No. 148. This Court has jurisdiction under Section 10(f) of the Act. The Board is seeking enforcement of its Order as issued against Emco Steel, Inc., herein "Emco" or the "Employer."

STATEMENT OF ISSUES PRESENTED

1. Did Emco violate Section 8(a)(1)(2) and (3) of the Act by recognizing and entering into a collective bargaining agreement with Local 810?
2. Did Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, herein "Local 455", ever represent an uncoerced majority of Emco's bargaining unit employees?
3. Was Dano Coli a permanent or a temporary employee of Emco?

STATEMENT OF FACTS

EMCO is a manufacturer engaged in the sale and distribution of iron and steel products.

Having commenced operations in September of 1974, Emco employs mechanics, (who cut the steel) and laborers. Contracts for the actual erection of steel

^{1/} "App." references are to the Appendix filed with the Court in this case. "Add." refers to the Statutory Addendum filed herewith.

when obtained by Emco are most frequently subcontracted and performed by employees of other employers.

According to the Board's findings of fact, on or about September 17, 1975, Local 455, upon having allegedly secured the support of two of Emco's three employees, sent a telegram dated September 17th, advising Emco that it represented an overwhelming majority of its production and maintenance employees and requesting a meeting for the purpose of discussing the terms and conditions of a collective bargaining agreement.

With regard to Local 455's alleged majority status, the Board concluded that at the time of the Local's demand for recognition, it represented both Dano Coli and John Frick, but not Tom McGovern (App. 449a). As Local 455's majority status rests upon a simple one card majority, the true employment status of Dano Coli is critical.

Contrary to Emco's assertions, both the Board and the Administrative Law Judge found Coli to be a permanent employee (App. 445a). However, the evidence reveals that when Coli commenced working for Emco in or about mid July of 1975, he was actually an employee of Brightman Iron Works, an employer who was then closed down as a result of a Local 455 industry-wide strike (App. 159a -160a).

Specifically, Coli testified that prior to his employment with Emco and during the period of such employment, he stored both the tools of his trade and his work clothes at Brightman Iron Works (App. 163a -166a). He further stated that during other prior like situations, he had likewise "...left the tools in the shop, and work clothes there, too." (App. 176a).

Moreover, Coli testified that when he was hired, Emco only had work pertaining to a firehouse then under construction. Upon completion of the firehouse project, Coli's employment with Emco was terminated. Further, the record clearly indicates that when Coli was hired, he was advised by Emco's president, Seymour Erney, that his employment would be of a temporary nature with a salary well below his salary at Brightman Iron Works and with the express understanding that he would receive no fringe benefits (App. 256a).

Erney's testimony that Coli did not intend to remain permanently with Emco was corroborated by employees McGovern and Frick, both of whom testified that Coli had told them of his intention to return to Brightman Iron Works at the conclusion of the strike (App. 443a).

Upon the presentation of evidence as to Local 455's alleged majority status and its demand for recognition, evidence was introduced as to certain discussions which allegedly took place, during the period

September 19 through October 6, 1975, between representatives of Emco and Local 455 concerning terms and conditions of a proposed collective bargaining agreement.

On or about October 8, 1975, Local 810 delegate Steven Silverman appeared at Emco's premises and informed Emco president Erney that Local 810 represented a majority of Emco's shop employees. At this point, Silverman produced authorization cards signed by Emco's five employees and presented them to Erney for the purpose of a card check. Erney thereupon took the Local 810 designation cards and compared the employee signatories with his payroll records.

According to Erney's testimony, recognition was accorded to Local 810 on October 9 and after several days of negotiation, a collective bargaining agreement was executed by the parties on October 14, 1975. (App. 458a).

ARGUMENTPOINT I

DANO COLI WAS NOT A PERMANENT EMPLOYEE
OF EMCO.

As Local 455's majority status is based upon a simple one card majority, the employment status of Dano Coli is of pivotal importance to the resolution of this appeal. The Board and Local 455 contend that Coli was a permanent employee, whereas Emco and Local 810 contend that Coli was merely a temporary employee.

As previously set forth herein, Coli sought and obtained employment with Emco at a time when his employer, Brightman Iron Works, was faced with an industry wide strike then being conducted by Local 455.

Apparently, being in dire need of employment, Coli accepted a position with Emco at a salary rate which was substantially less than he enjoyed at Brightman Iron Works and with an express understanding that he would not receive any fringe benefits while working for Emco.

Significantly, Coli, while accepting a position at Emco, continued to store both his tools and work clothes at the premises of Brightman Iron Works, as he had in past strike situations.

Moreover, the record is clear and the Administrative Law Judge concluded that Coli expressed his intent to both management representatives and to his

co-workers of his desire to return to the employ of Brightman Iron Works upon the resolution of the then pending strike.

In the case of Sentinel Printing and Publishing Co., 137 NLRB 1610 the Board in resolving the employment status of an employer concluded as follows:

In situations such as the present one involving the right of an employee to vote for his bargaining representative - one of the primary rights assured employees under the Act - we will not resolve questions concerning the permanency of employment status in derogation of the statutory right unless it is affirmatively and clearly shown that the employee's tenure is temporary. No such showing has been made in the present record. At most, the facts of Rue's employment history suggest he may not work for untold years for his present employer. They do not show that at any time either Rue or the Employer considered Rue's employment to be temporary or limited in duration of the strike in effect at the time of his employment.

In contradistinction to the previously cited Sentinel case, supra, it is clear that Coli's employment was that of a temporary rather than of a permanent nature. This conclusion is supported by such objective considerations as (1) Coli's expression to management and to his co-workers of his intent to return to Brightman Iron Works upon the resolution of the strike; (2) Coli's storing of his tools and work clothes at his employer's premises; and (3) by Coli's past history of storing tools and work clothes at Brightman Iron Works' premises until the resolution of previous strike situations.

Finally, Coli's acceptance of a reduced pay rate coupled with an understanding that he would not receive any fringe benefits while employed at Emco militates against a finding that he was a permanent employee.

Unlike such cases as M.J. Pirolli and Sons, Inc., 194 NLRL 241, and E.H. Sargent and Company, 99 NLRB 1318, wherein the employees involved were found to be permanent employees as they had no definite terminal dates of employment, Coli's date of termination was definite and related to a foreseeable event - the settlement of the industry-wide strike.

Upon consideration of the previously described objective factors concerning Coli's employment, it is submitted that Coli was a temporary employee.

POINT II

LOCAL 455 DID NOT REPRESENT AN UNCOERCED MAJORITY OF EMCO'S EMPLOYEES.

Upon a finding that Coli was in fact a temporary employee, (as urged in Point I), it must then be concluded that Local 455 did not at any time represent a majority of Emco's employees.

Accepting the Board's finding that employee John Frick had knowingly designated Local 455 as his collective bargaining representative and further accepting the conclusion that Tom McGovern was a supervisor within the meaning of Section 2(11) of the Act, Local 455 only represented employee Frick - wherein the record reveals Local 810 represented some five employees when it was accorded recognition.^{2/}

Significantly, if it is concluded that Coli was in fact a temporary employee, then Local 455, at the time of its demand for recognition, was at best the representative of a one man unit. In this connection, the Board in such cases as Foreign Car Center, Inc., 129 NLRB 319, 320 has held:

"...it would not certify a one-man unit because the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain. The Act therefore does not empower the Board to certify a one-man unit. By parity of reasoning, the Act precludes the Board from directing an employer to bargain with respect to such a unit."

^{2/} It appears from the record that at some undetermined point of time subsequent to Local 455's demand for recognition, the bargaining unit increased from that of one employee to that of five employees when Local 810 demanded recognition.

In Foreign Car Center, Inc., supra, the Board

went on to hold as follows:

"While we have held that the Act does not preclude bargaining with a Union on behalf of a single employee, if an employer is willing, we have never held that an employer's refusal to bargain with a representative on behalf of a one-man unit is a refusal to bargain within the meaning of Section 8(a)(5).

POINT III

EMCO DID NOT VIOLATE SECTION 8(a)(1)
(2) AND (3) OF THE ACT BY ENTERING
INTO A COLLECTIVE BARGAINING AGREEMENT
WITH LOCAL 810.

In concluding that Emco violated Sections 8(a)(1)(2) and (3) of the Act by entering into the contract with Local 810 on October 14, 1975, the Board apparently relied upon a finding of its Administrative Law Judge that any question concerning representation had already been resolved in favor of Local 455 when Emco first recognized Local 810. As Local 810 represented some five employees at the time it was accorded recognition whereas Local 455 only represented employee Frick (provided Coli is found to be a temporary employee) at the time the Board found it should have been accorded recognition, it is contended that the employer was faced with rival claims.

Under the circumstances of this case, where Local 455 only represented one employee (Frick) and whereas Local 810 prior to securing recognition from the Employer had secured recognition cards from five bargaining unit employees, it is urged that no real question concerning representation existed at the time Emco accorded recognition to Local 810 and that the contract of October 14th between Local 810 and Emco is valid.

If in fact Local 455's claim of representation is not supported by a finding of majority status, Emco's recognition of Local 810 was lawful and proper.

Upon being confronted with a rival union situation in Suburban Transit Corp. v. NLRB, 499 F 2d 78 (C.A. 3, 1974, cert. denied 419 U.S. 1089, on remand 218 NLRB No. 185, enf. denied ___ F 2d ___, 92 LRRM 3054 (C.A. 3, 1976), The Third Circuit Court of Appeals held:

We do not believe that by itself, it is an unfair labor practice for an employer to grant quick recognition to a union and to negotiate a hasty contract where that union represents an uncoerced majority of employees, even if the employer is motivated by the desire to freeze out a rival union."

Unlike Midwest Piping Supply Co., Inc., 63 NLRB 1060, wherein the Board held it was an unfair labor practice for an employer to recognize one of two or more competing unions while a question of representation was pending before the Board, in the instant situation, no representation petition was pending before the Board when Emco granted recognition to Local 810. Moreover, at the time Emco granted recognition to Local 810, Local 455 represented no more than one of Emco's five bargaining unit employees.

Under all of the foregoing circumstances, it is submitted that Emco did not violate Section 8(a)(1) (2) and (3) of the Act by executing the contract with Local 810 on October 14, 1975.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court find that Emco did not violate Sections 8(a)(1)(2) or (3) of the Act; that this Court reject and reverse the decision and Order of the Board; that this Court issue an Order dismissing the Complaint in its entirety; and that this Court deny the Board's cross-application for enforcement of its Order.

Respectfully submitted,

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April 29, 1977

A D D E N D U M

ADDENDUM

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et al) are as follows:

Section 2(11)

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

UNFAIR LABOR PRACTICES

Section 8 (a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization; ...

**COURT OF APPEALS
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HELPERS OF AMERICA,**

Petitioner,

- against -

**NATIONAL LABOR RELATIONS BOARD,
Respondent**

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Robert L. Martinez, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 234 East 33rd Street; New York, New York; 10016 That on the **2nd** day of **May**, 19 **77** deponent served the annexed

upon **Elliott Moore - Deputy Assoc. Gen'l Counsel** attorney(s) for **NLRB**

in this action, at **1717 Pennsylvania Avenue, N.W.
Washington, D.C.**

1) 16 Court, Brooklyn, NY
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York. *2) 350 Varichio Turnpike, 20570, Varichio, N.Y.*

Sworn to before me, this **2nd**
day of **May**, 19 **77**

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977

[Signature]
Robert L. Martinez